Nos. 04-19-00192-CR & 04-19-00193-CR

IN THE COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS SAN ANTONIO, TEXAS

JOHNNY JOE AVALOS,
Appellant

v.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE 437th JUDICIAL DISTRICT COURT OF BEXAR COUNTY, TEXAS CAUSE NUMBERS 2016-CR-10374 & 2018-CR-7068

STATE'S RESPONSE TO APPELLANT'S MOTION FOR EN BANC RECONSIDERATION

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE CASE

Appellant murdered five women, resulting in his guilty plea to two counts of capital murder. (192 CR 4; 193 CR 5; RR5 11-12.)[1] The trial court accepted his pleas and sentenced him to life without parole, which was mandatory under § 12.31(a)(2) of the Penal Code. (192 CR 25-26; 193 CR 285-86; RR5 12-14.)

On appeal, in keeping with his objections below and his motion for new trial, appellant challenged the imposition of life without parole absent an individualized hearing due to his status as an intellectually disabled person. After briefing by the parties, a panel of this Court heard oral arguments on November 5, 2019. On November 27, 2019, this Court granted the parties' joint motion to abate for a finding of whether appellant was intellectually disabled. On December 12, 2019, the trial court found appellant to be intellectually disabled and that he was so when he entered his plea. (192 CR Supp. 4-5; 193 CR Supp. 4-5.)

Thereafter, this Court, over a dissent, affirmed the trial court's sentence. *Avalos v. State*, ___ S.W.3d ___, Nos. 04-19-00192-CR & 04-19-00193-CR, 2020 WL 2858867, at *1-5 (Tex. App.—San Antonio June 3, 2020). On August 10, 2020, appellant filed a motion for en banc reconsideration. On September 22, 2020, the En Banc Court ordered the State to respond by October 10, 2020.

[1] The Reporter's Record of February 19, 2019, will be referenced as "RR5," followed by its respective page numbers. The Clerk's Records in appellate cause numbers 04-19-00192-CR & 04-19-00193-CR will be referenced as "192 CR" and "193 CR," respectively, and their supplements as "192 CR Supp." and "193 CR Supp.," respectively, followed by their page numbers.

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument. However, he fails to identify how or why oral argument would assist the Court. *See* Tex. R. App. P. 38.1(e) (noting that a statement requesting oral argument "should address *how* the court's decisional process would, or would not, be aided by oral argument" (emphasis added)). Moreover, the issues presented can be addressed with reference to the record and briefs alone. Thus, oral argument would not significantly aid this Court's determination of the issues presented and should, therefore, be denied.

ISSUES PRESENTED

STATE'S RESPONSE TO APPELLANT'S MOTION

Appellant failed to identify any extraordinary circumstances warranting en banc reconsideration of the panel opinion. Moreover, this case is controlled by the Supreme Court's general holding in *Harmelin v. Michigan*. Furthermore, the panel was correct that intellectually disabled adults are not sufficiently analogous to juveniles. Finally, even if the panel's "objective evidence" analysis was erroneous, it was merely an alternative theory supporting the judgment, and appellant failed to explain how an alternative analysis justifies en banc reconsideration.

ARGUMENT[2]

I. En banc reconsideration is inappropriate.

Appellant has foregone the option of rehearing by the original three-justice panel, instead only seeking en banc reconsideration. Such reconsideration is inappropriate in this case.

The Rules of Appellate Procedure govern en banc reconsideration of a panel opinion. Specifically, Rule 41.2(c) states in pertinent part,

> (c) *En Banc Consideration Disfavored.* En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration.

Tex. R. App. P. 41.2(c).

Thus, en banc reconsideration is appropriate in two situations: to secure or maintain uniformity of the court's decisions, or if "extraordinary circumstances" require en banc consideration. The first situation does not apply here because the panel opinion does not conflict with a prior opinion of this Court.

Moreover, appellant identifies no "extraordinary circumstance" that would justify en banc reconsideration. Since this case was decided, no opinion has been issued by a higher court or another Texas court of appeals which would bind or

[2] In addition to the arguments herein, this brief incorporates all previous arguments in the State's initial response brief (filed August 12, 2019) and its Request to File Additional Citations (filed October 30, 2019).

influence the panel's decision. Nor have any facts changed that would affect the judgement. In other words, there has been no intervening legal or factual circumstance warranting resort to the disfavored remedy of en banc reconsideration.

Further, that the issue here may be considered "important" does not render it an "extraordinary circumstance" as that term is used in Rule 41.2(c).

> The standard for en banc consideration is not whether a majority of the en banc court may disagree with all or a part of a panel opinion. *Neither is an assertion that an issue is "important" sufficient*. Rather, when there is no conflict among panel decisions, the existence of "extraordinary circumstances" is required before en banc consideration may be ordered.

In re Bustamante, 510 S.W.3d 732, 740 (Tex. App.—San Antonio 2016, orig. proceeding) (Martinez, J., dissenting) (emphasis added); *see also id*. at 741 n.2 (Chapa, J., dissenting) (agreeing that en banc consideration was unwarranted). "Importance" is nearly impossible to define, which is exactly why it is not determinative of what constitutes "extraordinary circumstances." Thus, even assuming that the issue presented here is somehow more "important" than other issues considered by the Court, that does not mean any extraordinary circumstances are present.

Notably, the federal appellate rules also disfavor en banc rehearings, but they specifically allow for them when a "proceeding involves a question of

exceptional importance." Fed. R. App. P. 35(a)(2). That wording differs from the language of Texas Rule 41.2(c), indicating that "importance" is not synonymous with "extraordinary circumstances." That Rules 35(a) and 41.2(c) are otherwise substantively identical further indicates their differences are not merely cosmetic.

Moreover, why do the appellate rules disfavor en banc reconsideration? To discourage review by what a party might assume to be a more-favorable panel of justices. In other words, it is impossible for the parties to tailor their arguments to what they assume particular justices want to hear if those justices are randomly assigned after the parties have submitted their briefs. By definition, that is not true when a court hears a case en banc. Thus, the rules make it is nearly impossible for the parties to pick their own court-of-appeals panel.

None of this is to suggest that any court-of-appeals justice would be predisposed to any particular argument or outcome. Rather, the rules' structure disincentivizes the parties to think in such terms when making their arguments. Disfavoring en banc reconsideration serves that end while also providing the parties (and the court) with a fail-safe in the two narrow and unusual circumstances outlined above. Therefore, the non-prevailing party's normal recourse is to move on to the next level of appellate review rather than belabor the entire court of appeals with a do-over request, fingers crossed that this time an expanded panel of justices will hand down a favorable outcome.

Here, appellant has not provided any explanation as to why en banc reconsideration is warranted except his assertion that the panel opinion was simply wrong. But a non-prevailing party's disagreement with a panel opinion is hardly "extraordinary." And there is a remedy for such disagreement, namely, a petition for discretionary review.

In short, appellant has offered no justification for en banc review of the panel's reasoned opinion other than his disagreement with it. If he thought the panel had misapplied the applicable law, he could have requested that it reconsider its analysis. But he did not, and the Rules of Appellate Procedure highly discourage—if not completely foreclose—resort to reconsideration by the entire Court. Instead, his remedy is to seek review by the Court of Criminal Appeals.

II. This case is controlled by *Harmelin v. Michigan*.

Moving on to appellant's substantive argument, his argument is not that intellectually disabled defendants cannot receive life-without-parole sentences, but rather, the *mandatory* imposition of life without parole is cruel and unusual if the offender is intellectually disabled. As a result, this case is controlled by *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Supreme Court declared a general rule that the mandatory imposition of life without parole is not cruel and unusual. As explained more below, it has only deviated from that rule for juvenile defendants. In all other circumstances, *Harmelin*'s general holding controls.

The panel opinion rejected the State's reliance on *Harmelin* because "there is no indication that the appellant in *Harmelin* was intellectually disabled." *Avalos*, 2020 WL 2858867, at *4. Paraphrasing *Miller v. Alabama*, 567 U.S. 460, 481 (2012), it stated, "*Harmelin* is not controlling because it 'had nothing to do with [intellectually disabled persons].'" *Id*. It continued, "Furthermore, the Supreme Court in *Harmelin* was able to reach a majority in its ultimate holding, but the plurality and concurrence disagreed as to the appropriate legal principles and modes of constitutional interpretation, and the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)]." *Id*. With respect, the former assertion ignores the proper role of the lower courts in our hierarchal court system, and the latter is not entirely correct.

Starting with the second assertion first, in *Harmelin*, the defendant made two distinct attacks on his sentence. First, his life-without-parole sentence was cruel and unusual because it was "significantly disproportionate" to the crime he committed. *Harmelin*, 501 U.S. at 961. Second, the imposition of life without parole absent an individualized sentencing hearing was cruel and unusual. *Id*. at 961-62. In other words, like appellant, Harmelin's second argument attacked automatic life without parole—it was not based on a disproportionality theory. *Id*. at 994 ("Petitioner claims that his sentence violates the Eighth Amendment for a reason *in addition to its alleged disproportionality*." (emphasis added)).

Harmelin's proportionality argument was rejected by the Court, but, as the panel opinion stated, its reasoning was fractured. *Compare id*. at 962-94 (opinion of Scalia, J.) *with id*. at 996-1005 (opinion of Kennedy, J.).

However, rejection of Harmelin's procedural argument—which corresponds with appellant's—garnered a *majority* of the Court. *Id*. at 994-96 (Part IV of Justice Scalia's opinion); *id*. at 996 (Kennedy, J., concurring with Part IV). *See also id*. at 1006-08 (Justice Kennedy further explaining why mandatory life-without-parole sentences are constitutional). This can also be seen in the Court's heading, which clearly states that Justice Scalia "delivered the opinion of the Court with respect to Part IV[.]" *Harmelin*, 501 U.S. at 961.

Thus, the panel opinion was correct in that *Harmelin*'s *proportionality* discussion was fractured, and that *Atkins* later based its decision on a disproportionality theory. But appellant is not making a proportionality argument. If he were, he would, like Atkins, be attacking mandatory life-without-parole sentences for intellectually disabled defendants in all instances. Instead, he is making a procedural claim, namely, the punishment was imposed in a cruel and unusual way in that it denied him a chance to present mitigating evidence. Again, that argument was rejected by a clear majority of the *Harmelin* Court. *Id*. at 994-96.

The panel opinion's first assertion—that *Harmelin* does not control because it "had nothing to with [intellectually disabled persons]"—is also unavailing because of the Supreme Court's unique role in abrogating its prior rulings. As explained below, until the Supreme Court itself specifically speaks on this issue as it relates to intellectually disabled defendants, this Court is bound to apply *Harmelin*'s general holding.

The Supreme Court has repeatedly instructed lower courts to follow its precedents *even if* those precedents seem to have been implicitly abrogated or overruled by later doctrinal or factual developments. *E.g.*, *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005) (expressing gratitude towards the lower court for adhering to the Court's precedent even though that precedent seemed to have been

undermined by later interpretive developments); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . The trial court . . . was . . . correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent."); *see also Knick v. Township of Scott*, 139 S. Ct. 2162, 2177-78 (2019) ("[O]nly this Court or a constitutional amendment can alter our holdings.").

Specifically, it has stated, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989); *see also id*. at 486 (Stevens, J. dissenting) (noting that the lower court engaged in "an indefensible brand of judicial activism" by refusing to follow controlling precedent that seemed to have been abrogated by later case law).

That instruction has been followed by numerous federal circuits and Texas courts. *See, e.g., United States v. Dinh*, 920 F.3d 307, 312 (5th Cir. 2019); *Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (the argument that more recent Supreme Court opinions have nullified a previous case is "a losing argument in the court of appeals"); *Sheffield Development Co., Inc. v. City of Glenn Heights*,

140 S.W.3d 660, 674 (Tex. 2004); *Sellers v. State*, 13-18-00572-CR, 2019 WL 2042040, at *3 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, no pet.) (mem. op., not designated for publication); *see also Ex parte Williams*, 200 S.W.3d 819, 820-823 (Tex. App.—Beaumont 2006, no pet.) (questioning the continued validity of a general holding of the Court of Criminal Appeals, but applying that holding anyway).

In fact, since this case was decided, the Fifth and Sixth Circuits have rejected arguments that Supreme Court rulings were implicitly overruled. The Fifth Circuit overruled a claim that male-only draft registration violated the Fifth Amendment because that issue was controlled by *Rostker v. Goldberg*, 453 U.S. 57 (1981). *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 547-48 (5th Cir. 2020) (per curiam). "The [*Rostker* Court] based its reasoning on the fact that women were then barred from serving in combat and deferred to Congress's considered judgment about how to run the military." *Id*. at 548. Now, however, the military has integrated women into all combat roles. *Id*. Despite that, women are still not required to register for the draft, whereas men are. *Id*. Accordingly, the trial court granted the plaintiffs summary judgment, reasoning "that *Rostker* no longer controlled because women may now serve in combat." *Id*.

The *National Coalition* Court reversed, explaining that, despite the complete erosion of *Rostker*'s factual basis, it was still bound by that decision because it

could not "ignore a decision from the Supreme Court unless directed to do so by the Court itself." *Id*. at 549. Following the law as it is "respect[s] the Supreme Court's singular role in deciding the continuing viability of its own precedents." *Id*. While the factual underpinning of the controlling Supreme Court decision has changed, "that does not grant a court of appeals license to disregard or overrule that precedent." *Id*. at 549-50 (citing *Rodriguez de Quijas*, *supra*, and *Agostini*, *supra*). Accordingly, the trial court was reversed and the case dismissed.

Likewise, in *Thompson v. Marietta Education Association*, ___ F.3d ___, No. 19-4217, 2020 WL 5015460 (6th Cir. Aug. 5, 2020), a teacher sued the educational association and board of education for violating her First Amendment rights, claiming that the reasoning of *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), which directly controlled, had been undermined by the Supreme Court's holding in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). The Sixth Circuit agreed that *Knight* rested on a now-nonexistent doctrinal foundation. *Thompson*, 2020 WL 5015460, at *1-3. Nonetheless, it refused to apply *Janus* because to do so would require it to "functionally overrule" *Knight*, "[a]nd that is something lower court judges have no authority to do." *Id*. at *3; *see also id*. (quoting *Rodriguez de Quijas*, *supra*).

Thus, as can be seen, even when a case's factual and doctrinal foundations have been completely undermined by later Supreme Court opinions, lower courts

are still bound by the Supreme Court's on-point holdings. The same is true in the instant case.

Here, the Supreme Court rule at issue is *Harmelin*'s holding that mandatory life-without-parole sentences are not cruel and unusual. The Supreme Court has only deviated from that holding in cases involving offenders who committed homicides while juveniles. *Miller v. Alabama*, 567 U.S. 460 (2012). On the other hand, the Supreme Court has never deviated from or abrogated *Harmelin*'s holding in the context of intellectually disabled offenders. It might do so in the future. But until it does, this Court must adhere to *Harmelin*'s general rule even in the face of subsequent doctrinal developments that may seem to undermine it.

What, then, to make of *Miller*'s declaration that "*Harmelin* had nothing to do with children," *Miller*, 567 U.S. at 481, on which the panel opinion relied? In other words, why would *Miller* turn on the age distinction between Harmelin and Miller? The *Miller* Court itself answered that by stating, "[I]f (as *Harmelin* recognized) 'death is different,' children are different too." *Id*. As will be discussed more below, *Miller*'s entire reasoning rested on the fundamental difference between children and adults.

Along those lines, the panel opinion ignored that it was *the Supreme Court itself* that made that declaration. It alone has the prerogative to decide whether its holdings apply in a given situation after a general rule—like *Harmelin*'s—has been

laid down. In *Miller*, it decided that *Harmelin* did not apply because of what it considered to be a fundamental distinction between the two defendants. It did not concern itself with the differences between intellectually disabled persons and other adults because those were not the facts before it. Thus, it cannot be assumed that the high court will see those with intellectual disabilities as fundamentally different from other persons in the context of mandatory life-without-parole sentences. Accordingly, the panel acted outside its prerogative when it decided that *Harmelin* did not apply because of what it considered to be a fundamental distinction between Harmelin and appellant. That is a road not open to this Court in our hierarchical system. *See Price*, 915 F.3d at 1119 ("The road the plaintiffs urge is not open to us in our hierarchical system.").

An analogy helps illustrate the point. Some neuroscience research has suggested that humans, especially males, may not reach full maturity until around the age of 25. If a non-intellectually-disabled, 19-year-old offender argued that, in light of such science, *Miller* entitled him to a discretionary hearing before being subject to life without parole, this Court would be forced to reject that claim and apply *Harmelin*'s holding. That is so because, despite changes to our understanding of maturity, and notwithstanding similarities between young adults to juveniles, this Court would still be bound, in the context of non-juvenile offenders, by *Harmelin*'s general holding.

In other words, this Court could not say, "There is no indication that the appellant in *Harmelin* was an adult between the ages of 18-25. Thus, *Harmelin* is not controlling because it 'had nothing to do with [young adults].'"

The same would be true when reviewing the sentences of a host of different types of defendants who may share characteristics with juveniles, notably those defendants with certain physical, mental, or emotional disabilities. *See Modarresi v. State*, 488 S.W.3d 455 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.) (applying *Harmelin* even though defendant suffered from post-partum depression associated with Bipolar Disorder). Simply, despite the seeming appropriateness of deviating from a holding in a particular case, abrogation of general Supreme Court holdings, including *Harmelin*'s, rests with the Supreme Court, not the lower courts.

Nor does *Atkins*, which categorically barred the death penalty for intellectually disabled defendants, make a difference because it was not concerned with the mandatory imposition of a particular punishment, but rather, the imposition of that punishment in all instances. Thus, it developed along a different doctrinal theory not at issue here—disproportionality—which, as the panel noted, the *Harmelin* Court did not reach a majority on.

Moreover, *Atkins* perfectly illustrates why the Supreme Court forbids lower courts from deviating from its general holdings. *Atkins* was a landmark holding. We have no idea what discussions went on among the Justices when they were

cobbling together a coalition to reach such an extraordinary result. It may well be that a key number of Justices were only comfortable joining the majority because they knew their opinion did not compromise the states' ability to impose mandatory life-without-parole sentences on intellectually disabled defendants. In other words, if *Atkins* compromised *Harmelin*'s general holding, then there may not have been enough votes to form a majority.

If Part IV of *Harmelin* had never been handed down, then this situation would be different. In that instance, there would not be an underlying baseline rule regarding the mandatory imposition of life without parole to which lower courts are bound, and from which the Supreme Court could, if it saw fit, deviate from. In that case, lower courts could potentially extend *Miller* and related holdings to new circumstances that the Supreme Court had not yet addressed—and then that Court could, in its discretion, decide if the lower courts were right to do so. But *Harmelin* does exist, and, as a result, only the Supreme Court may depart from it. That is, no lower court may extrapolate what the Supreme Court may do with *Harmelin*'s general rule in the context of intellectually disabled defendants.

Of course, this Court may express its doubts about *Harmelin*'s continued validity in the context of intellectually disabled (or any other) offenders, and such an analysis is welcomed by the Supreme Court. *See Eberhart*, 546 U.S. at 20 ("By adhering to its understanding of precedent, yet plainly expressing its doubts, [the

lower court] facilitated our review."). But, nevertheless, it may not unilaterally digress from the Supreme Court's precedent. Instead, such a "decision would have to come from the Supreme Court." *Dinh*, 920 F.3d at 312.

Therefore, because *Harmelin* is controlling, appellant's motion for en banc reconsideration should be denied.

III. The panel correctly declined to analogize intellectually disabled persons to juveniles.

Appellant faults the panel opinion for not properly linking several Supreme Court cases together to reach the result he thinks is right.[3] But the panel majority correctly declined to analogize intellectually disabled persons to juveniles. While those two classes of people may share some characteristics, they differ in key respects.

The Tyler Court of Appeals has addressed this same issue. *Parsons v. State*, No. 12-16-00330-CR, 2018 WL 3627527, at *4-5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication). There, the defendant was 25 years old, but had the "mind of a 12 year old." *Id*. at *4. Despite that, the *Parsons* Court upheld her mandatory life-without-parole sentence, noting that *Miller* outlined five key distinctions between juveniles and adults. *Id*. at *5.

Appellant attacks the panel's reliance on *Parsons* because it is not binding and it did not discuss the aggregate holdings of several Supreme Court cases. But, while obviously not binding on this Court, *Parsons* is persuasive because it is the only other Texas court to have addressed this issue, and courts of appeals often find wisdom in the reasoned judgment of their sister courts. And, despite appellant's claims that *Parsons* improperly failed to discuss the aggregate holdings

[3] Oddly, appellant argues that several cases that have nothing to do with mandatory life without parole are relevant, whereas *Harmelin*, which dealt directly with that topic, is not.

of *Atkins*, *Roper*, *Graham*, and *Miller*, there was no need to do that because, of those cases, only *Miller*—the case *Parsons* relied upon—addresses mandatory life-without-parole sentences. In fact, its failure to address those cases indicates that they are not relevant to an analysis of this issue.[4]

As outlined by *Miller*, *Parsons*, and the panel majority, the obvious difference between juveniles and any adults, including intellectually disabled adults, is that juveniles are less mentally and emotionally developed because they are still maturing. Thus, "juvenile offenders have greater prospects for reform than adult offenders," "the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders," and "recklessness, impulsivity, and risk taking are more likely to be transient in juveniles than in adults[.]" *Parsons*, 2018 WL 3627527, at *5. In other words, a defining characteristic of childhood is change, which is not true of adulthood. Therefore, a legislature, when making generally applicable laws, may assume that adults as a class will never change and, thus, must be sentenced to life without parole for capital murder.[5]

[4] In fairness, *Parsons* also did not address *Harmelin*. But that may be because, in their briefs, neither party cited *Harmelin*, let alone argued it controlled. On the other hand, *Atkins*, *Roper*, *Graham*, and *Miller* were all cited and discussed by the parties.

[5] Relatedly, in *Modarresi*, the defendant suffered from post-partum depression associated with Bipolar Disorder. *Modarresi*, 488 S.W.3d at 465-67. That is to say, her condition was not a fixed trait. Like juveniles, her mental state could change over time. Despite that, the *Modarresi* Court concluded that *Miller* was unavailing because her situation was not sufficiently analogous to juveniles even though her condition was transient.

That is true for intellectually disabled defendants as well. *Atkins* concluded that retribution and deterrence did not justify imposition of *the death penalty* for intellectually disabled defendants, but it did not speak to life without parole, and we do not know what it would have said about those theories of punishment regarding that sentence.

Moreover, the Supreme Court conspicuously declined to address another penological theory of punishment: incapacitation. *See Atkins*, 536 U.S. at 350 (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future[.]'"). Life without parole serves that purpose by preventing intellectually disabled offenders who have proven themselves to be especially dangerous—like appellant—from hurting anyone else, while also sparing them the death penalty. Since the *Atkins* majority did not address incapacitation, it necessarily did not discount it as justifying life-without-parole sentences for intellectually disabled defendants.

Unfortunately, unlike juveniles, there is no indication that appellant will ever change; he will always have an intellectual disability. And he has proven himself to be very dangerous, as evidenced by the fact that he murdered five women. The legislature acted within its purview when it decided that dangerous offenders with fixed traits should be forever isolated from the rest of society. And such

defendants are not without recourse for reprieve if society ever sours on the idea of imprisoning them indefinitely "since there remain the possibilities of retroactive legislative reduction and executive clemency." *Harmelin*, 501 U.S. at 996.

Such alternative reprieves are not just theoretical possibilities. The Texas legislature has prohibited life-without-parole sentences for all juveniles, including capital offenders. Tex. Penal Code Ann. § 12.31(a)(1). So, while the Legislature has seen fit to extend greater protections to juveniles than the constitution requires, *see Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014), it has not done so for the intellectually disabled. It may in the future. But absent a declaration from the Supreme Court otherwise, the constitution requires no more.

Furthermore, another difference between juveniles and adults is the simple fact that they are younger. Thus, "a sentence of life without parole is harsher for juveniles than adults because of their age," and "a sentence of life without parole for juveniles is akin to a death sentence because of their age." *Parsons*, 2018 WL 3627527, at *5. Neither of those reasons apply to adults, intellectually disabled or otherwise.

Accordingly, appellant's motion for en banc reconsideration should be denied for that reason as well.

IV. The panel's discussion of "objective evidence," even if erroneous, does not justify en banc reconsideration.

The panel majority advanced another reason to reject appellant's challenge, namely, he failed to provide "any citations, discussion, or analysis of objective evidence of evolving standards of decency, such as the sentencing laws or practices of other states." *Avalos*, 2020 WL 2858867, at *5. That seemed to be an alternative reason to reject his argument rather than a necessary component of the panel's holding. Thus, even if appellant is correct that the panel majority incorrectly faulted him for not providing such objective evidence, the result should still stand based on its conclusion that juveniles and intellectually disabled adults are not sufficiently analogous, which, as explained above, is correct. Indeed, the *Parsons* Court reached its conclusion on that basis alone.

And, regardless, being "wrong" is not an "extraordinary circumstance" justifying en banc reconsideration. Instead, as discussed above, appellant could have submitted a motion for rehearing urging the panel majority to reconsider its analysis, or he can petition the Court of Criminal Appeals and make his case there. The "disfavored" option of en banc reconsideration should not be a party's go-to

when other options are at his disposal, especially when the objected-to analysis is not necessary to the ultimate holding.[6]

Consequently, appellant's motion for en banc reconsideration should be denied, and the judgment should remain affirmed.

PRAYER

The State of Texas submits that appellant's motion for en banc reconsideration should be DENIED, and the judgment of the trial court should, in all things, be AFFIRMED.

Respectfully submitted,

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[6] Appellant is correct that the State never made an "objective evidence" argument in its response to his arguments. That does not make the panel majority's analysis wrong, nor does it justify en banc reconsideration.

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in appellee's response brief is 4,489. I also certify that a true and correct copy of this brief was emailed to appellant Johnny Joe Avalos's attorney, Jorge G. Aristotelidis, at jgaristo67@gmail.com, on this the 2nd day of October, 2020.

/s/*Andrew N. Warthen*
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